

SEP 30 2010

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JOSEPH SHANNON SMITH,
Petitioner,

v.

Civil Action No. 7:10-cv-00433

MEMORANDUM OPINION

COMMONWEALTH OF VIRGINIA,
Respondent.

By: Hon. James C. Turk
Senior United States District Judge

Petitioner Joseph Shannon Smith, a Virginia inmate proceeding pro se, filed a petition for appeal from a decision by the Supreme Court of Virginia. Petitioner seeks this court's review of the Supreme Court of Virginia's denial of his state-court writ of actual innocence. However, the court does not have appellate jurisdiction over the Supreme Court of Virginia. Accordingly, the court construes petitioner's request as a petition for writ of habeas corpus, pursuant to 28 U.S.C. § 2254.

However, court records indicate that the petitioner previously filed a § 2254 petition concerning the same convictions for second-degree murder, grand larceny, and use of a firearm in a felony entered by the Circuit Court of Pittsylvania County in December 1997. Smith v. Bassett, No. 7:03-cv-00687, slip op. at 1-2 (W.D. Va. Sept. 29, 2004). Thus, the petitioner's current petition is a subsequent one, falling under the prohibition in 28 U.S.C. § 2244(b) against a second or successive petition. Pursuant to this section, a federal district court may consider a second or successive § 2254 petition only upon specific certification from the United States Court of Appeals for the Fourth Circuit that the claims in the petition meet certain criteria. 28 U.S.C. § 2244(b). Because the petitioner has not submitted any evidence that he has obtained such certification by the Court of Appeals, the court will deny as moot his motion to proceed in forma pauperis and will dismiss petitioner's § 2254 habeas petition without prejudice as

successive.* Based upon the court's finding that the petitioner has not made the requisite substantial showing of denial of a constitutional right as required by 28 U.S.C. § 2253(c)(1), a certificate of appealability is denied.

The Clerk is directed to send copies of this memorandum opinion and the accompanying order to the petitioner.

ENTER: This 30th day of September, 2010.



Senior United States District Judge

*A Fourth Circuit form and instructions for filing a request for certification to file a subsequent petition are available from the Fourth Circuit at the following address: Office of the Clerk, United States Court of Appeals for the Fourth Circuit, 900 E. Main St., Richmond, VA 23219.